

## USE OF GRAND JURY MATERIALS IN GOVERNMENT DAMAGE ACTION

*United States v. General Electric Company*  
209 F.Supp. 197 (E.D. Pa. 1962)

Damage actions brought by the Federal government frequently follow criminal prosecutions based upon the same misconduct. Questions then arise as to whether government attorneys may use grand jury materials for the civil action and whether they may be made available to the civil defendants. A prior Supreme Court decision held that civil defendants cannot have access to these materials, absent special circumstances. The instant case holds that government attorneys may use grand jury materials in a civil action for damages. The government brought damage actions under the Clayton Act<sup>1</sup> and the False Claims Act.<sup>2</sup> Defendants moved to impound the grand jury materials in order to prevent government use of information obtained through grand jury proceedings in the preparation and trial of these actions. The court denied defendant's motion, holding that Rule 6(e) of the Federal Rules of Criminal Procedure<sup>3</sup> permits government use of grand jury materials in actions for damages.<sup>4</sup>

---

<sup>1</sup> 69 Stat. 282 (1955), 15 U.S.C. §15a (1958) :

Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefore in the United States district court . . . and shall recover actual damages by it sustained and the cost of suit.

<sup>2</sup> Rev. Stat. §§3490, 5438 (1875), 31 U.S.C. §231 (1958) :

Any person . . . who shall make or cause to be made . . . any claim upon or against the Government of the United States . . . knowing such claim to be false, fictitious, or fraudulent claim . . . or who enters into any agreement, combination, or conspiracy to defraud the Government of the United States . . . shall forfeit and pay to the United States the sum of \$2,000.00 and, in addition, double the amount of damages which the United States may have sustained by reason of the doing or committing such act, together with the costs of suit; and such forfeiture and damages shall be sued for in the same suit.

<sup>3</sup> Fed. R. Crim. P. 6(e), 18 U.S.C. App. (1958) :

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

<sup>4</sup> 209 F. Supp. 197 (1962).

Rule 6(e) provides two ways in which grand jury materials may be used for litigation. The first sentence authorizes disclosure of grand jury materials to "the attorneys for the government for use in the performance of their duties." Defendants moved to impound the grand jury materials to prevent their use under this first sentence of Rule 6(e). The second sentence permits disclosure when ". . . directed by the court preliminarily to or in connection with a judicial proceeding. . . ." This sentence has been interpreted to permit the use of limited portions of grand jury records by private litigants in civil damage suits.<sup>5</sup> The second sentence of Rule 6(e) is not directly involved in the instant case, since the availability of these materials to defendants was not in issue. The disposition of the present case depends upon the interpretation given the "duties" referred to in the first sentence, i.e., may government attorneys use these materials for "duties" associated with government damage actions.

Considered in its context, as part of the Federal Rules of Criminal Procedure, the reference to government attorneys in the first sentence of Rule 6(e) seems to refer to those engaged in criminal prosecutions. But a previous case held that the government may use grand jury material to prepare for injunction proceedings under the antitrust laws.<sup>6</sup> Defendants in the instant case relied upon *dicta* in several cases which suggested that the government's use of grand jury materials for litigation was limited to criminal prosecutions and suits in equity to restrain violations of the antitrust laws.<sup>7</sup> Defendants sought to distinguish such "enforcement proceedings" from a civil action for damages such as the instant case. But the court held that the government could use grand jury materials for any type of legal proceedings in which the government was a party in interest. The court stated that it would be "illogical" to construe the second sentence of Rule 6(e) to be applicable to civil damage actions while holding the first sentence to be applicable only to criminal actions or suits to enjoin criminal violations.<sup>8</sup>

Although previous cases have assumed that the government may use grand jury materials to prepare for civil damage actions,<sup>9</sup> this is the first case expressly deciding this point. It was held in *United States v. Procter & Gamble Company*<sup>10</sup> that the government may use grand jury materials for the preparation and trial of suits to enjoin violations of the antitrust laws. Defendants in *Procter & Gamble* had moved to prevent the use of these materials and any "leads" which the government had obtained there-

<sup>5</sup> *Herman Schwabe, Inc. v. United Shoe Machinery Corp.*, 194 F. Supp. 763 (D. Mass. 1958); *In the Matter of Special 1952 Grand Jury*, 22 F.R.D. 102 (E.D. Pa. 1958); *United States v. Ben Grunstein & Sons Co.*, 137 F. Supp. 197 (D.N.J. 1955).

<sup>6</sup> *United States v. Procter & Gamble Co.*, 180 F. Supp. 195 (D. N.J. 1959).

<sup>7</sup> *In re April 1956 Term Grand Jury*, 239 F. 2d 263, 272 (7th Cir. 1956); *United States v. Procter & Gamble Co.*, 180 F. Supp. 195, 203-04 (D.N.J. 1959); *In re Petroleum Industry Investigation*, 152 F. Supp. 646, 647 (E.D. Va. 1957).

<sup>8</sup> 209 F. Supp. 197, 199.

<sup>9</sup> *United States v. Ben Grunstein & Sons Co.*, 137 F. Supp. 197, 199 (D.N.J. 1955); *United States v. General Motors Corp.*, 15 F.R.D. 486, 488 (D. Del. 1954).

<sup>10</sup> *United States v. Procter & Gamble Co.*, 180 F. Supp. 195 (D.N.J. 1959).

from. The court stressed the hardship which such an order would cause the government, since it had taken seven years to prepare the case, including a year and a half of grand jury investigations. The court also noted that the injunction proceeding was primarily concerned with the existence or imminence of criminal violations of the antitrust laws.<sup>11</sup> The *Procter & Gamble* decision rests upon the court's recognition of the quasi-criminal nature of such injunction proceedings.

The court in the instant case interpreted *Procter & Gamble* to mean that the government is not limited to using grand jury materials in criminal proceedings.<sup>12</sup> The court went on to say that it would be "contrary to reason" to permit the government to use grand jury records in injunction proceedings under the antitrust laws while prohibiting such use in civil damage suits under these same laws.<sup>13</sup> But there are important differences between the government's damage action and its suit for an injunction, even though both are authorized by the antitrust laws. The purpose of the injunction suit is analogous to the purpose of the criminal action. The government brings these actions to punish or restrain (by threat of punishment) criminal violations of the antitrust laws. On the other hand, the government's damage action is strictly compensatory; there is no punitive aspect involved.<sup>14</sup> Although the public interest in the enforcement of criminal prosecutions may justify use of grand jury materials in injunction proceedings under the antitrust laws, the public interest involved in the damage action is not so demanding as to require that the government be accorded advantages denied to other civil litigants. There was no compensatory damage remedy available to the federal government under the antitrust laws until 1955. In a 1941 case, the Supreme Court held that the government was not a "person" under section 7 of the Sherman Act<sup>15</sup> which granted a treble damage remedy to persons injured in their business or property by a violation of the Sherman Act.<sup>16</sup> In 1955, Congress amended the Clayton Act by adding section 4A which permits the government to recover actual damages and costs when the government is injured in its business or property by a violation of the antitrust laws.<sup>17</sup> In creating this remedy, Congress clearly recognized the different character of the government damage action. The Senate report discussed the history of the damage remedy given private parties under section 4 of the Clayton Act,<sup>18</sup> in which plaintiffs may recover treble damages.<sup>19</sup> Treble damages

<sup>11</sup> Id. at 203-04.

<sup>12</sup> 209 F. Sup. 197, 201.

<sup>13</sup> Id. at 202.

<sup>14</sup> The government action differs from the private damage remedy in the amount of damages recovered. A private party may recover treble damages, 38 Stat. 731 (1914), 15 U.S.C. §15 (1958), but the government recovers only actual damages, n. 1 *supra*.

<sup>15</sup> *United States v. Cooper Corporation*, 312 U.S. 600 (1941).

<sup>16</sup> 26 Stat. 210 (1890), repealed 69 Stat. 283 (1955).

<sup>17</sup> 69 Stat. 282 (1955); 15 U.S.C. 15a (1958).

<sup>18</sup> 38 Stat. 730 (1914); 15 U.S.C. 15 (1958).

<sup>19</sup> S. Rep. No. 619, 84th Cong. 1st Sess. (1955); U.S. Code Cong. & Ad. News, 84th Cong. 1st Sess. (1955) vol. 2, p. 2328.

were made available as a means of encouraging private parties to bear a part of the cost and time involved in enforcing antitrust legislation.<sup>20</sup> The government was given the right to recover only actual damages and costs of suit. The committee stated that:

The United States is, of course, charged by law with the enforcement of the antitrust laws and it would be wholly improper to write into the statute a provision whose chief purpose is to promote the institution of suits. The United States is, of course, amply equipped with the criminal and civil process with which to enforce the antitrust laws. The proposed legislation, quite properly, treats the United States solely as a buyer of goods and permits the recovery of damages suffered.<sup>21</sup>

The instant case was apparently brought by the government in order to obtain compensation for financial injuries which it suffered as a purchaser of electrical equipment. So far as this case is based upon the damage remedy given the government by the antitrust laws, it looks very similar to an orthodox suit for compensatory damages. One may ask why the plaintiff in such an action need be given the advantage of possessing the records of a grand jury hearing when the defendant does not have access to these records.

Use of the grand jury solely as a means of preparing for civil litigation is clearly improper.<sup>22</sup> A prior decision can be construed as holding that it is also improper to use the grand jury as a means of preparing for both criminal and civil actions.<sup>23</sup> Yet the instant case permits the use of grand jury materials in damage actions once the information has been obtained through valid grand jury proceedings. This creates an obvious hazard: the use of the grand jury as an *ex parte* discovery device for civil litigation. It would seem to be difficult to control this type of abuse of the grand jury. The Supreme Court has refused to hold that the introduction of inadequate or incompetent evidence before a grand jury is a ground for a motion to quash an indictment. The Court feared that "abuses of criminal practice would be enhanced if indictments could be upset on such a ground."<sup>24</sup> Indeed, how could a court determine that evidence sought by a grand jury would not be relevant to projected criminal actions? A court would naturally be reluctant to handicap the government in its preparation for criminal actions by restricting grand jury investigations.

Alleged misuse of the grand jury investigation was the basis of an order prohibiting the use of grand jury materials in civil litigation in the

---

<sup>20</sup> Id. at 2329.

<sup>21</sup> Id. at 2330.

<sup>22</sup> *United States v. Procter & Gamble Co.*, 356 U.S. 681 (1958); *United States v. Procter & Gamble Co.*, 180 F. Supp. 195 (D.N.J. 1959).

<sup>23</sup> *In re April 1956 Term Grand Jury*, 239 F.2d 263 (7th Cir. 1956) discussed *infra*.

<sup>24</sup> *Holt v. United States*, 218 U.S. 245, 248 (1910) (Mr. Justice Holmes); quoted with approval in *Costello v. United States*, 350 U.S. 359, 363 (1956).

case of *In re April 1956 Term Grand Jury*.<sup>25</sup> The Treasury Department was alleged to have caused the Justice Department to commence a grand jury hearing in order to obtain certain documents required in civil cases for the recovery of taxes then pending before the Tax Court. The Treasury had failed to acquire these documents by use of administrative subpoenas. Once the documents were obtained by the grand jury, they were turned over to Treasury agents for the purported purpose of assisting the grand jury in its investigation. The court stated:

While we hold that the district court cannot properly interfere with the action of the grand jury in turning over to third persons, including treasury agents, voluminous records and accounts for the sole purpose of examination and report to the grand jury, as an assistance to it, we also hold that persons, nonmembers of the grand jury, thus having access to said records and documents, have no right to use them for any purpose whatsoever except to assist the grand jury in its work. Such persons may not in any manner use these records and documents, or any information acquired therefrom, for any other purpose, and specifically for any civil purpose, such as tax collection or otherwise.<sup>26</sup>

The court in the principal case distinguished *In re April 1956 Term Grand Jury* on the ground that the case was a condemnation of "the perversion of grand jury proceedings" in order to obtain evidence for a civil case which was not obtainable by other methods.<sup>27</sup> But the court in *April 1956 Grand Jury* did not state that the evidence obtained was not relevant to a criminal action. Nor did that court find that the Department of Justice did not have a *bona fide* intent to bring criminal proceedings.<sup>28</sup> Under the rule announced in the instant case, it is difficult to see how such abuses of the grand jury can be prevented so long as the evidence is relevant to the criminal action and the attorneys involved are "attorneys for the government" within the meaning of Rule 6(e).

Since *April Term Grand Jury* involved Treasury agents, no construction of Rule 6(e) was involved as such agents are not "attorneys for the government" under Rule 6(e).<sup>29</sup> The instant case is, to that extent, not in conflict with that holding. But the contrasting results of these two cases point out an incongruity: why should grand jury records be used in an action for compensatory damages under the antitrust laws, where the government sues only as a "buyer of goods", and not be available in a suit to recover taxes if both actions are preceded by criminal proceedings?

The reason behind a distinction between suits conducted by the De-

---

<sup>25</sup> Note 30, *supra*.

<sup>26</sup> *Id.* at 272.

<sup>27</sup> 209 F. Supp. 197, 201.

<sup>28</sup> Criminal proceedings which resulted from the grand jury hearing are described in *United States v. Shotwell Manufacturing Co.*, 287 F.2d 667 (7th Cir. 1961) *aff'd* 371 U.S. 341 (1963).

<sup>29</sup> Fed. R. Crim. P. 54(c), 18 U.S.C., provides that attorney for the government means the Attorney General, a United States Attorney, or their authorized assistants.

partment of Justice and those conducted by the Treasury is not readily apparent. Surely the public interest in the collection of taxes is as great as the public interest in the recovery of civil damages by the government.

Government damage actions under the antitrust laws are not viewed as a means of enforcing antitrust policies. The government is "amply equipped with the criminal and civil processes required to enforce the antitrust laws."<sup>30</sup> Similar sanctions against persons who present false claims are provided in Title 18, U.S.C.<sup>31</sup> Therefore it is not necessary to give the government an advantage in civil damage actions by permitting it to use grand jury materials as an aid in enforcing these policies. Such an advantage serves to strengthen the government in its role as a proprietor, not as the enforcer of public policies.

The use of grand jury materials for civil damage actions based upon antitrust violations also seems unnecessary. The doctrine of collateral estoppel and the availability of the records from prior criminal actions or injunction proceedings insure that the government will have sufficient evidence to contend with issues which are common to both the enforcement proceedings and an action for damages based upon the antitrust violations which were the subject of the prior enforcement proceedings. If the government wins a criminal action or injunction suit against the party defending the action for damages, issues common to both the enforcement proceedings and the action for damages which were resolved against the defendants in the prior action cannot be re-litigated by the defendants in the action for damages.<sup>32</sup> Use of collateral estoppel would present difficulties in some cases, since there would be a question whether the party in the later action was "privity" to the former action. This situation would arise where the government obtained a criminal conviction against a company's officers or employees without obtaining a conviction or decree against the company. The company could then argue in the damage action that it was not bound by the judgment or decree in the former action since it was not a party, or privity of a party, in the prior action. But this difficulty is not involved in the present case, since the defendants received heavy fines in prior criminal prosecutions.<sup>33</sup>

If the government did not obtain a judgment or decree in a preceding suit, the records of the preceding suit are available for use in the damage action. If the grand jury records are impounded at the commencement of a damage action, the government would be forced to rely upon the

---

<sup>30</sup> Note 26 *supra*, at 2330.

<sup>31</sup> 18 U.S.C., sections 287, 371, 1001 (1958).

<sup>32</sup> Local 167, *International Brotherhood of Teamsters v. United States*, 291 U.S. 293, 298 (1934); *United States v. Salvatore*, 140 F. Supp. 470 (E.D. Pa. 1956); *United States v. Ben Grunstein & Sons Co.*, 127 F. Supp. 907 (D.N.J. 1955).

Section 16(a) U.S.C. Title 15 (1958); 38 Stat. 731 (1914) as amended by 69 Stat. 283 (1955), inexplicably makes a judgment or decree obtained by the government in a criminal prosecution or injunction proceeding *prima facie* evidence in an action for damages as to all matters respecting which said judgment or decree would be an estoppel as between the parties in the original action.

<sup>33</sup> *New York Times*, February 8, 1961, p. 16, col. 4.

record of the prior enforcement proceeding in preparing its damage action. Since defendant would have been able to prevent the introduction of irrelevant or immaterial evidence into the enforcement proceeding by timely objections during the proceeding, evidence gathered by the grand jury which would be harmful to defendant in a damage action—but which is not relevant to the enforcement proceeding—could be eliminated during the enforcement proceeding. By forcing the government to rely upon the “filtered” record of the enforcement proceeding, the courts would eliminate much of the advantage which the government enjoys by being able to hold grand jury hearings prior to civil damage actions. This procedure would frustrate any attempt to use the grand jury to discover evidence useful only in a civil action for damages. Since trial records are available to both parties, the equality usually accorded the parties to purely civil litigation would be preserved. It is conceded that this is not the only solution to the problem presented in the instant case, nor is it the best solution imaginable. It is offered as an alternative to the procedure suggested, of permitting both parties to use the grand jury materials.

The decision in the instant case has justification on practical grounds. A court should be reluctant to issue an order which would require the government to duplicate by the process of civil depositions information already available in a grand jury transcript. Indeed, a reasonable solution would be to permit discovery of these materials by defendant. This would put both parties on an equal footing with respect to grand jury materials. But the Supreme Court has foreclosed this solution. A prior ruling in the *Procter & Gamble* case held that defendants could not obtain discovery of grand jury materials by a motion under Rule 34, Fed. R. Civ. P., even though the government was admittedly using the materials to prepare its case, where the only ground for “good cause” alleged was the tactical advantage accorded the government by its possession of grand jury materials.<sup>34</sup> In *Procter & Gamble* the government had taken seven years, including an eighteen month grand jury investigation, to prepare its case.<sup>35</sup> A complaint alleging continuous misconduct since 1926 was filed less than three weeks after the discharge of the grand jury.<sup>36</sup> After the trial court granted defendants’ motion to inspect the grand jury records, the government obtained an amendment of the order to provide for dismissal of the suit upon the government’s failure to comply with the order. The two issues involved which are relevant here were whether the requisite “good cause” under Rule 34 existed and whether the government had used the grand jury as an *ex parte* discovery device for civil litigation. Both issues were decided against defendants.

The Court held that the tactical disadvantage suffered by defendants was not a sufficient “good cause” for the reason that the traditional policy of secrecy of grand jury materials precluded “wholesale discovery” except

---

<sup>34</sup> *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958).

<sup>35</sup> *United States v. Procter & Gamble Co.*, *supra*, note 6.

<sup>36</sup> Brief of Appellee, *The Association of American Soap & Glycerin Producers, Inc.*, p. 20; Brief of Appellee, *Colgate-Palmolive Company*, p. 3.

in exceptional circumstances. Only one of the reasons for the policy of secrecy was discussed by the Court: that of encouraging witnesses to testify freely before grand juries.<sup>37</sup> More specifically, the Court thought that disclosure would be unwise in an antitrust case because the witnesses are often economically dependent upon defendants and would be reluctant to testify if they knew their testimony would be divulged at a later time.

The government's brief stated that twenty-four of the twenty-eight witnesses before the grand jury were past or present officers or employees of the defendant.<sup>38</sup> But the government's brief also stated that the witnesses were under subpoena.<sup>39</sup> The government suggested that defendants take depositions of all the grand jury witnesses. One might wonder whether it is wise policy to encourage witnesses to testify in *ex parte* hearings by promising perpetual secrecy to their testimony. This reasoning also ignores the chance that the government might have to go to trial in a particular case, thus exposing substantial portions of the grand jury materials. The Court also ignored the fact that they government could claim the benefits of secrecy only because the government had used the wrong method of discovery for a civil case. Had the government used civil discovery methods the testimony would have been taken in public depositions since Congress has prohibited the use of *ex parte* depositions in civil antitrust litigation.<sup>40</sup> It is difficult to understand why defendant should be forced to suffer the consequences of the plaintiff-government's mistake. Allowance of defendant's motion to discover the grand jury materials would seem to have been the best method of correcting the imbalance caused by the use of the grand jury instead of public depositions.

The Court refused to find that the government intentionally used the grand jury to prepare for civil litigation, since the record did not indicate that the government did not plan to ask for indictments during the grand jury investigation. The Court observed that complete disclosure should be made in a case where the government has used the grand jury for civil

---

<sup>37</sup> The most quoted statement of the reasons behind the policy of secrecy is taken from *United States v. Amazon Industrial Chemical Corporation* (D. Md. 1931) 55 F.2d 254, 261:

- (1) To prevent the escape of those whose indictment may be contemplated;
- (2) To insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning grand jurors;
- (3) To prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it;
- (4) To encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes;
- (5) To protect the innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

<sup>38</sup> Brief of Plaintiff-Appellant, p. 15.

<sup>39</sup> *Id.* at p. 41.

<sup>40</sup> 37 stat. 731 (1913), 15 U.S.C. §30 (1958).



litigation. On this basis, the trial court later granted partial discovery of the grand jury records after the government admitted that it had continued the grand jury after deciding to file a civil complaint rather than prosecute a criminal action.<sup>41</sup>

In effect, criminal procedures were used to prepare for civil litigation. The government had the best of two worlds without the respective disadvantages: it was able to use the grand jury for discovery, but need prove its case only by a preponderance, not beyond a reasonable doubt, to a court of equity, not a jury. The hardships on defendants were not lessened because the government did not have a bad motive when it convened the grand jury.

The plaintiff-government's suggestion that defendants take depositions of the grand jury witnesses should have made the Court ponder the effect of its decision on the judicial policy of expediting the trial of protracted cases. The *Procter & Gamble* jury sat for eighteen months. Such procedures do nothing more ultimately than to increase the stenographers' share of the gross national product.

The result in the instant case is objectionable mainly because of the Supreme Court's holding in *Procter & Gamble*. Because *Procter & Gamble* denies discovery of grand jury materials to a civil defendant, the decision in the instant case extends the inequities found in antitrust injunction suits into the area of government damage actions, an area where the important enforcement policies involved in the government equity suit are not as material. This is an area where the government should be given the same treatment as any other litigant. The government-as-quartermaster should not claim the prerogatives of the government-as-prosecutor.

---

<sup>41</sup> United States v. Procter & Gamble Co., *supra*, note 35.